UNITED OVERSEAS BANK (MALAYSIA) BHD A

v.

ANDREW LEE SIEW LING

COURT OF APPEAL, PUTRAJAYA B
JEFFREY TAN JCA
ZAHARAH IBRAHIM JCA
LINTON ALBERT JCA
[CIVIL APPEAL NO: J-02(IM)-2768-2009]
22 AUGUST 2011 C

BANKING: *Banks and banking business - Loan agreement - Guarantor executed letter of indemnity and guarantee - Borrower defaulted in settling loan amount - Borrower wound-up in a separate action - Claim against guarantor for interest on outstanding loan amount - Whether bank prohibited from claiming interest against guarantor after borrower wound-up - Whether letter of guarantee and indemnity a separate and independent contract - Bankruptcy Act 1967, s. 8(2A)* D

BANKRUPTCY: *Interest - Debt - Letter of guarantee and indemnity executed by guarantor - Borrower defaulted in settling loan amount - Borrower wound-up in a separate action - Claim against guarantor for interest on outstanding loan amount - Whether bank prohibited from claiming interest against guarantor after borrower wound-up - Bankruptcy Act 1967, s. 8(2A)* E F

CONTRACT: *Guarantee - Guarantee and indemnity - Borrower defaulted in settling loan amount - Borrower wound-up in a separate action - Claim against guarantor for interest on outstanding loan amount - Whether bank prohibited from claiming interest against guarantor after borrower wound-up - Whether letter of guarantee and indemnity a separate and independent contract - Bankruptcy Act 1967, s. 8(2A)* G

The appellant had granted a term loan of RM1,000,000 to Monzo (M) Sdn Bhd ('borrower') at the interest rate of 1.75% per annum in addition to the appellant's prevailing base lending rate. H The loan was secured by: (i) a charge over two pieces of land and (ii) a letter of guarantee and indemnity executed by the respondent and one Mok Hwee Huan ('MHH'), who was subsequently adjudged a bankrupt. The borrower defaulted in its payment to the appellant and was wound-up by a separate action I on 19 June 2002. The appellant then commenced this suit against the respondent. In the High Court, the learned judge held that

s. 8(2A) of the Bankruptcy Act 1967 ('the Act') acts as a statutory clamp on secured creditors which prohibits them from claiming any further interest on the debt after the winding-up of a company if the secured creditors fail to realise their security within the period of six months as mandated by that section. Further, by invoking s. 24 of the Contracts Act 1950 ('CA50'), the learned judge held that the provisions in the letter of guarantee and indemnity which made the guarantors liable for interest after the period prescribed by s. 8(2A) of the Act were void, illegal and unenforceable. Being dissatisfied with the said decision, the appellant appealed to this court. The issues that arose for consideration herein were, (i) whether s. 8(2A) of the Act operates to the extent that it prohibits the appellant, as a secured creditor, from claiming against the respondent for interest on the outstanding loan amount beyond the date the borrower's winding-up order was made and (ii) whether the provisions in the letter of guarantee and indemnity which provided for interest beyond the borrower's winding-up was void for illegality.

Held (allowing appeal with costs of RM5,000)

Per Zaharah Ibrahim JCA delivering the judgment of the court:

(1) The interpretation to s. 8(2A) of the Act is that it merely limits the secured creditor's right to continue imposing interest on the outstanding amount *vis-à-vis* the bankrupt or the wound-up debtor and its property. Although a secured creditor under s. 8(2) of the Act is free to deal with his security, he must realise it within six months of the receiving order. Otherwise, his right to impose interest is curtailed in that he cannot impose any further interest beyond the date of the receiving order. On the other hand, it was not the intention of parliament in enacting s. 8(2A) of the Act to affect the interest of the secured creditor *vis-à-vis* any guarantor or indemnifier. (paras 27, 33, 44 & 46)

(2) As defined by s. 77 of the CA50, a contract of indemnity is a contract which is entered into by two parties, namely, the promisor and the promisee, by which the promisor promises to save the promisee from losses caused by the promisor's conduct or by the conduct of any other person. Whereas, a contract of guarantee as defined by s. 79 of the CA50 is a contract which involves three parties, namely, the principal

debtor, the surety and the creditor. The surety gives a guarantee that he will perform the principal debtor's promise, or will discharge the principal debtor's liability to the creditor if the principal debtor fails to do so. (para 41)

(3) The borrower was not a party to the letter of guarantee and indemnity which was executed by MHH and the respondent. The said letter contained several clauses which clearly showed the intention of both guarantors to undertake liability for repayment of the term loan and interest thereon not merely as sureties, but also as principal debtors as well as indemnifiers, notwithstanding the incapacity of the borrower. (paras 34 & 35)

(4) Pursuant to s. 81 of the CA50, the liability of a surety is co-extensive with that of the principal debtor, unless otherwise provided by the contract. It was clear by the terms of the letter of guarantee and indemnity that it was a separate and independent contract and that contract was a contract of indemnity. Therefore, s. 81 of the CA50 did not apply to enable the respondent to take advantage of the provisions in s. 8(2A) of the Act, so as to limit his liability in the same manner as the borrower would be able to, namely, limit his ability to pay interest on the outstanding amount to the date the borrower was wound-up, and not beyond that. Further, the issue of contracting out of the statutory prohibition of s. 8(2A) of the Act and the issue of illegality did not arise. (paras 42, 43 & 46)

Bahasa Malaysia *Translation Of Headnotes*

Perayu telah memberi satu pinjaman berkala sebanyak RM1,000,000 kepada Monzo (M) Sdn Bhd ('peminjam') pada kadar faedah 1.75% setahun sebagai tambahan kepada kadar pinjaman asas perayu. Pinjaman itu telah dijamin oleh: (i) gadaian atas dua bidang tanah dan (ii) surat gerenti dan tanggung rugi yang dimeterai oleh responden dan satu Mok Hwee Huan ('MHH'), dimana beliau telah menjadi bankrap selepas itu. Peminjam gagal untuk menyelesaikan bayarannya kepada perayu dan telah digulungkan dalam satu tindakan berasingan pada 19 Jun 2002. Perayu kemudiannya memulakan guaman ini terhadap responden. Di Mahkamah Tinggi, yang arif hakim telah memutuskan bahawa s. 8(2A) Akta Kebankrapan 1967 ('Akta') bertindak sebagai penghalang statutori terhadap pemiutang bercagar yang melarang mereka daripada menuntut faedah lanjutan

terhadap sesuatu hutang selepas penggulungan sebuah syarikat jika pemiutang bercagar gagal untuk memanfaatkan sekuritinya dalam masa enam bulan seperti yang diperuntukan oleh seksyen tersebut. Selain itu, dengan membangkitkan s. 24 Akta Kontrak 1950 ('AK50'), yang arif hakim memutuskan bahawa peruntukan di dalam surat gerenti dan tanggungrugi yang membuatkan penjamin bertanggungjawab untuk faedah selepas tempoh yang dinyatakan oleh s. 8(2A) Akta adalah terbatal, menyalahi undang-undang dan tidak boleh dikuatkuasakan. Tidak puas hati dengan keputusan tersebut, perayu merayu ke mahkamah ini. Isu-isu yang dibangkitkan untuk pertimbangan di sini adalah, (i) sama ada s. 8(2A) Akta berfungsi ke tahap di mana ianya melarang perayu, sebagai pemiutang bercagar, daripada menuntut faedah tertunggak bagi pinjaman melampaui tarikh perintah penggulungan peminjam dibuat dan (ii) sama ada peruntukan di dalam surat gerenti dan tanggungrugi yang membenarkan faedah melampaui tarikh penggulungan peminjam adalah terbatal dan menyalahi undang-undang.

Diputuskan (membenarkan rayuan dengan kos RM5,000)
Oleh Zaharah Ibrahim HMR menyampaikan penghakiman mahkamah:

(1) Tafsiran s. 8(2A) Akta adalah bahawa ianya sekadar membataskan hak pemiutang bercagar untuk terus mengenakan faedah bagi amaun tertunggak *vis-à-vis* si bankrap atau penghutang yang digulung dan hartanya. Walau pun pemiutang bercagar di bawah s. 8(2A) Akta bebas untuk mengendalikan sekuritinya, ianya mesti dimanfaatkan dalam masa enam bulan dari perintah penerimaan. Jika tidak, haknya untuk mengenakan faedah akan dibataskan di mana faedah lanjut tidak boleh dikenakan melampaui tarikh perintah penerimaan. Sebaliknya, ianya bukanlah kehendak Parlimen untuk menggubal s. 8(2A) Akta bagi menjejaskan kepentingan pemiutang bercagar *vis-à-vis* seseorang penjamin atau penanggungrugi.

(2) Seperti yang ditafsirkan oleh s. 77 AK50, kontrak gantirugi adalah kontrak yang dimasuki oleh dua pihak, iaitu, pemberi janji dan penerima janji, di mana pemberi janji berjanji untuk menyelamatkan penerima janji daripada kehilangan yang disebabkan oleh kelakuan pemberi janji sendiri atau pun melalui kelakuan orang lain. Manakala kontrak gerenti seperti yang ditafsirkan oleh s. 79 AK50 adalah suatu kontak yang melibatkan tiga pihak, iaitu, penghutang utama, penjamin dan

pemiutang. Penjamin memberi gerenti bahawa beliau akan melaksanakan janji penghutang utama, atau melepaskan liabiliti penghutang utama terhadap pemiutang jika penghutang utama gagal untuk berbuat sedemikian.

(3) Peminjam bukanlah pihak kepada surat gerenti dan tanggungrugi yang telah dimeterai oleh MHH dan responden. Surat tersebut mengandungi beberapa klausa yang jelas menunjukkan niat kedua-dua penjamin untuk mengakujanji liabiliti bagi pembayaran balik pinjaman berkala dan faedah terhadapnya, bukan sahaja sebagai penjamin, malah, sebagai peghutang utama dan juga sebagai penanggungrugi, tanpa mengambilkira ketakupayaan penjamin.

(4) Berdasarkan s. 81 AK50, liabiliti penjamin adalah sama-ekstensif dengan penghutang utama, kecuali jika dinyatakan sebaliknnya dalam kontrak itu. Adalah jelas melalui terma-terma dalam surat gerenti dan tanggungrugi bahawa ianya adalah kontrak yang asing dan bersendirian dan kontrak tersebut adalah satu kontrak tanggungrugi. Oleh itu, s. 81 AK50 tidak terpakai untuk membolehkan responden mengambil kesempatan terhadap peruntukkan s. 8(2A) Akta, untuk menghadkan liabilitinya dalam cara yang sama seperti peminjam, iaitu, untuk menghadkan keupayaannya membayar faedah terhadap amaun tertunggak sehingga ke tarikh peminjam digulungkan, dan tidak melampauinya. Tambahan, isu perjanjian adalah di luar larangan s. 8(2A) Akta dan isu menyalahi undang-undang tidak bangkit sama sekali.

Case(s) referred to:

Government of Malaysia v. Mohamed Amin Hassan [1985] 1 LNS 79 FC ***(refd)***

Home Luck Investments Sdn Bhd v. Commissioner of Federal Capital of Kuala Lumpur [1969] 1 LNS 56 HC ***(refd)***

K Balasubramaniam (Likuidator Bagi Kosmopolitan Credit & Leasing Sdn Bhd) v. MBf Finance Bhd & Ors [2005] 1 CLJ 793 FC ***(refd)***

Ling Sing Hung & Ors v. Kontiki Trading Pte Ltd [1998] 4 CLJ 345 CA ***(refd)***

Magor and St Mellons Rural District Council v. Newport Corporation [1952] AC 189 ***(refd)***

Pau Ngie Siong & Anor v. Kontiki Trading Pte Ltd [2000] 3 CLJ 560 FC ***(refd)***

Pepper v. Hart [1992] 3 WLR 1032 ***(refd)***

Sia Siew Hong & Ors v Lim Gim Chian & Anor [1996] 3 CLJ 26 CA ***(refd)***

South East Asia Insurance Bhd v. Nasir Ibrahim [1992] 4 CLJ 1801; [1992] 1 CLJ (Rep) 295 SC ***(refd)***

Legislation referred to:
Bankruptcy Act 1967, ss. 8(1), (2), (2A), 33A, 42, 43(4), para 9 sch C
Civil Law Act 1956, s. 4(1)
Companies Act 1965, s. 291
Contracts Act 1950, ss. 24, 77, 79, 81

For the appellant - Lim Siew Ming (Loke Yuen Hong with her); M/s Raja, Daryl & Loh
For the respondent - PK Nathan; M/s PK Nathan & Co

[Appeal from High Court, Johor Bahru; Civil Suit No: MT2-22-791-2003]

[Editor's note: For the High Court judgment, please see United Overseas Bank (Malaysia) Bhd v. Mok Hue Huan & Anor [2010] 9 CLJ 764.]

Reported by Kumitha Abdul Majid

JUDGMENT

Zaharah Ibrahim JCA:

Brief Background Facts

[1] The appellant, a bank licensed under the Banking and Financial Institutions Act 1989, granted a term loan of RM1,000,000 (the loan) to one Monzo (M) Sdn Bhd (the borrower) at the interest rate of 1.75% per annum in addition to the appellant s prevailing base lending rate (interest).

[2] The Loan was secured by a charge over two pieces of land, HS(D) 191512 PTD 89769 and HS(D) 191513 PTD 89770, (the security) situated in the Mukim of Plentong, District of Johor Bahru.

[3] The loan was also secured by a letter of guarantee and indemnity executed by Mok Hwee Huan (who was the 1st defendant in the court below) and the respondent.

[4] The borrower defaulted. It was wound up by a separate action in the Kuala Lumpur High Court on 19 June 2002.

[5] The appellant then commenced this suit against Mok Hwee Huan and the respondent. However, Mok Hwee Huan was adjudged bankrupt in Singapore on 25 October 2002.

[6] The appellant obtained the order for sale of the charged lands (the security) on 25 July 2006.

[7] The appellant applied for summary judgement against the respondent *vide* summons in chambers dated 5 October 2006 (encl. 16). A

[8] The respondent contested the appellant's application for summary judgement only with regard to the amount due to the appellant. B

[9] Before the High Court, the parties had agreed that the issues to be determined were as follows:

(a) Whether the liability of the 2nd defendant under the letter of guarantee and indemnity is limited to the extent of the outstanding amount owing by Monzo as the date of the Winding-Up Order, namely 19 June 2002. C

(b) Whether the letter of guarantee and indemnity is an independent covenant to pay by the 2nd defendant thereby entitling the plaintiff to continue charging interest subsequent to the Winding-Up of Monzo. D

(c) Whether the plaintiff can in law claim interest after 19 June 2002 the date of the Winding-Up Order of Monzo by virtue of s. 8(2A) of the Bankruptcy Act 1967 read together with s. 4(1) of the Civil Law Act 1956. E

[10] The learned High Court judge held that subs. 8(2A) of the Bankruptcy Act 1967 acts as a statutory clamp on secured creditors prohibiting them from claiming any further interest on the debt after the winding up of a company if the secured creditors fail to realise their security within the period of six months as mandated by that subsection. The prohibition, he held, attaches to the debt so as to prohibit the secured creditors from claiming for interest beyond that period, not only from the borrower, but also from the guarantors. F G

[11] The learned High Court judge went further by invoking s. 24 of the Contracts Act 1950 and holding that the provisions in the letter of guarantee and indemnity which make the guarantors liable for interest after the period prescribed by subs. 8(2A) are void, illegal and unenforceable as it defeats the purpose and intent of s. 8(2A) of the Act. H

[12] The appellant, being dissatisfied with the decision of the learned High Court judge appealed to this court against that decision. I

A **Issues**

[13] The primary issue in the appeal before us is whether subs. 8(2A) of the Bankruptcy Act 1967 operates to the extent that it prohibits the appellant, as a secured creditor, from claiming, as against the respondent, who is not a bankrupt, interest on the outstanding amount of the loan beyond the date of the winding up order made against the borrower.

[14] The secondary issue is whether the provisions of the letter of guarantee and indemnity which provide for interest beyond the winding up of the borrower void for illegality.

Analysis Of Issues

Objective Of Subsection 8(2A) Of The Bankruptcy Act 1967

[15] Subsection 8(2A) of the Bankruptcy Act 1967 is as follows:

> (2A) Notwithstanding subsection (2), no secured creditor shall be entitled to any interest in respect of his debt after the making of a receiving order if he does not realize his security within six months from the date of the receiving order

[16] To understand the purpose behind the introduction of subs. (2A) into s. 8 on 17 July 1992, the learned High Court judge referred to the speech of the Honourable Minister in moving the bill for several amendments to the Bankruptcy Act 1967 for its second reading in the Dewan Rakyat on 14 May 1992. Subsection 8(2A) was one of such amendments. The House of Lords decision in *Pepper v. Hart* [1992] 3 WLR 1032, [1993] 1 All ER 42, HL (E) was relied upon as enabling the court to do so. We agree that such reference can be made.

[17] The Honourable Minister explained the rationale for the introduction of subs. (2A) into s. 8 as follows:

> Seterusnya pindaan adalah juga dicadangkan dibuat kepada Seksyen 8 bagi memperuntukkan bahawa tiada apa-apa bunga boleh dibayar kepada pemiutang bercagar jika sekiranya pemiutang tersebut gagal menghasilkan cagarannya dalam tempoh 6 bulan dari tarikh perintah penerimaan dibuat. Rasionalnya ialah pada amalan biasa dan berdasarkan peruntukan yang sedia ada, didapati segolongan pemiutang bercagar mengambil masa yang terlalu lama untuk menghasilkan harta tersebut. Manakala bunga yang perlu dibayar oleh penghutang berterusan sehinggalah jualan dilaksanakan. Perbuatan sedemikian adalah tidak adil kepada pemiutang penghutang.

(Our translation:

Amendments are also proposed to be made to Section 8 to provide that no interest can be paid to a secured creditor if the secured creditor fails to realise his security within a period of 6 months from the date the receiving order is made. The rationale is that in ordinary practice and based on the existing provisions, it is found that some secured creditors take an inordinately long time to realise the property. Meanwhile the interest which must be paid by the debtor continues until the sale is completed. Such action is unfair to unsecured creditors and also to debtors). (emphasis added)

How Is The Delay In Realising The Security Unfair To Unsecured Creditors?

[18] The answer can only be arrived at by not reading subs. 8(2A) of the Bankruptcy Act 1967 in isolation but in reading s. 8 in its entirety and in the context of the whole of the Bankruptcy Act 1967.

[19] Under subs. 8(1), when a receiving order is made against a debtor, the Director General of Insolvency becomes the receiver of the property of the debtor and thereafter, except as directed by this Act, no creditor to whom the debtor is indebted in respect of any debt provable in bankruptcy shall have any remedy against the property or person of the debtor in respect of the debt, or shall proceed with or commence any action or other legal proceeding in respect of such debt unless with the leave of the court and on such terms as the court may impose.

[20] There is however an exception to the prohibition in subs. 8(1). That exception is granted by subs. 8(2) to secured creditors, who may realize or otherwise deal with his security as if s. 8 had not been passed.

[21] Under para. 9 of sch. C to the Bankruptcy Act 1967 (which contains rules which must be observed with respect to the mode of proving debts, as mandated by s. 42 of the Act) if a secured creditor realizes his security, but there is still an outstanding amount due under the debt, he may prove for the balance due to him after deducting the net amount realized. In other words, the secured creditor may now join in for a share in the balance of the assets of the debtor together with the unsecured creditors.

[22] If the secured creditor delays in realizing the security and continues to charge interest on the debt owed to him, there is every possibility that the value of the security when realized will become insufficient to meet the repayment of the outstanding amount due to the secured creditor. He will then participate in the share of the balance of the assets of the debtor. The balance amount still due to the secured creditor will now rank *pari passu*, under subs. 43(4) of the Bankruptcy Act 1967, with the debts proved by the unsecured creditors, thereby reducing their respective share in the assets.

[23] If the secured creditor acts promptly to realise the security upon the receiving order being made, no further interest will be charged. The proceeds obtained upon the realisation of the property may be sufficient to meet the full amount due to the secured creditor, and therefore the secured creditor will have no need to prove for the balance of the amount due to him. Even if the proceeds are not sufficient to meet the full amount due to the secured creditor, the balance amount may be small enough so as not to substantially affect the shares of the unsecured creditors in the remaining assets of the debtor should the secured creditor choose to prove for the balance due to him.

[24] It can be seen therefore that where a secured creditor delays in realising his security, and continues to charge interest on the amount due to him, that delay may cause unfairness to unsecured creditors. How is the delay in realising the security unfair to the debtor?

[25] A bankrupt is a natural person, unlike a company. His bankruptcy places him under disability. He will always endeavour to have himself discharged from bankruptcy. However, every application for his discharge, either by the court under s. 33 or by the Director General of Insolvency under s. 33A, of the Bankruptcy Act 1967, may be met with objection by his creditors usually on the ground of insufficient dividends having been paid on the debts proved in bankruptcy.

[26] It follows therefore that if a secured creditor delays in realising his security and continues to charge interest on the amount due to him, there is a higher probability that there will be no balance left over from the proceeds of realisation to go into the pool of assets to be shared by unsecured creditors. If in fact the proceeds are insufficient to pay the amount due to the secured creditor and he participates in the balance of the debtors'

assets, there will be more creditors sharing the pool of the remainder of the debtor's assets. The net effect of this is that the dividend payable to each creditor will be smaller thus reducing the likelihood of the debtor's application for discharge later being favourably considered. Hence the unfairness to the debtor.

[27] It is for the purpose of mitigating that unfairness to the unsecured creditors and the debtors that subs. (2A) was introduced into s. 8 of the Bankruptcy Act 1967 in 1992. Although a secured creditor, under subs. 8(2), is free to deal with his security, he must realise his security within six months of the receiving order. Otherwise, his right to impose interest is curtailed in that he cannot impose any further interest beyond the date of the receiving order. Application of subs. 8(2A) to wound up companies

[28] To show how subs. 8(2A) of the Bankruptcy Act 1967 applies to companies which have been wound up, the parties had referred to subsection 4(1) of the Civil Law Act 1956, which reads as follows:

> 4(1) In the administration by any Court of the assets of any deceased person whose estate proves to be insufficient for the payment in full of his debts and liabilities, and in the winding up of any company under any law from time to time in force relating to companies, whose assets prove to be insufficient for the payment of its debts and liabilities, and the costs of winding up, the same rules shall prevail and be observed, as to the respective rights of secured and unsecured creditors, and as to the respective rights of secured and unsecured creditors, and as to debts and liabilities provable, and as to the valuation of annuities and future and contingent liabilities respectively, as are in force for the time being, under the law of bankruptcy, with respect to the estates of persons adjudged bankrupt.

[29] However Parliament had enacted in s. 291 of the Companies Act 1965 specific provisions having the same effect as subs. 4(1) of the Civil Law Act 1956. Section 291 of the Companies Act 1965 is as follows:

> **Proof of debts**
>
> 291. (1) In every winding up, subject in the case of insolvent companies to the application in accordance with this Act of the law relating to bankruptcy, all debts payable on a contingency and all claims against the company present or future, certain or

A contingent, ascertained or sounding only in damages shall be admissible to proof against the company, a just estimate being made so far as possible of the value of such debts or claims as are subject to any contingency or sound only in damages or for some other reason do not bear a certain value.

B (2) Subject to section 292, in the winding up of an insolvent company the same rules shall prevail and be observed with regard to the respective rights of secured and unsecured creditors and debts provable and the valuation of annuities and future and contingent liabilities as are in force for the time being under the C law relating to bankruptcy in relation to the estates of bankrupt persons, and all persons who in any such case would be entitled to prove for and receive dividends out of the assets of the company may come in under the winding up and make such claims against the company as they respectively are entitled to by virtue of this section.

D

[30] Therefore, it is s. 291 of the Companies Act 1965 which now operates to make the provisions of the Bankruptcy Act 1967 apply in relation to the debts of a wound up company. This was clearly pointed out by the Federal Court in *K Balasubramaniam* E *(Likuidator Bagi Kosmopolitan Credit & Leasing Sdn Bhd) v. MBf Finance Bhd & Ors* [2005] 1 CLJ 793.

[31] However, unlike a bankrupt, whose objective as mentioned above is always to obtain his discharge, the same cannot be true in the case of a wound up company. F

[32] Upon an order for winding up being made, a liquidator is appointed. His job basically is to take into his custody all the property and things in action to which the company is or appears to be entitled and to distribute dividends to the creditors, adjust G the rights of the contributories and make a final return, if there is any asset left, to the contributories. He can then make an application to the court that he be released and the company be dissolved. There is therefore no issue of the company being revived, unless there is a stay of the winding up order.

H

[33] Therefore, in the context of a wound up company, the unfairness sought to be overcome by subs. 8(2A) relates only to unsecured creditors, *vis-à-vis* the property of the wound up company itself.

I

The Letter Of Guarantee And Indemnity

[34] The respondent, together with Mok Hwee Huan, executed a letter of guarantee and indemnity on 14 November 2000. The borrower is not a party to the letter of guarantee and indemnity. We shall refer to the respondent and Mok Hwee Huan (as they have been referred to by the parties) as guarantors.

[35] The letter of guarantee and indemnity contains several clauses which clearly show the intention of both guarantors to undertake the liability for the repayment of the term loan and interest thereon not merely as sureties, but also as a principal debtors as well as indemnifiers, notwithstanding the incapacity of the borrower.

[36] Clause 1 of the letter of guarantee and indemnity contains an undertaking by the guarantors to pay on demand all sums due under the facility granted to the borrower together with interest thereon as well as all legal and other costs charges and expenses incurred in enforcing any security or to obtain the moneys guaranteed. Their liability is limited to $500,000 Singapore Dollars (which was the then equivalent of RM1,000,000) together with all interest, costs, charges and expenses as stated above.

[37] Clauses 9 and 10 of the letter of guarantee state that:

> 9. Though as between us and the Customer we are sureties only for the Customer yet as between you and us we shall be deemed to be principal debtors for all the monies the payment of which is hereby guaranteed and accordingly we shall not be discharged nor shall our liability be affected in any way by any fact circumstance act omission or means whatsoever whether known to you or not whereby our liability hereunder would have been discharged if we had not been principal debtors.
>
> 10. No assurance or security or payment which may be avoided on the bankruptcy or liquidation (as the case may be) or otherwise of the Customer or ourselves and no release settlement or discharge which may have been given or made on the faith of such assurance security or payment shall prejudice your right to recover from us monies to the full extent hereof as if such assurance security payment release settlement or discharge (as the case may be) had never been granted or made.

[38] Clauses 17 and 21, among others, reinforce the undertaking in cls. 9 and 10, as shown below:

> 17. As a separate and independent stipulation we hereby agree that in the event the monies hereby guaranteed may not be recoverable on the footing of a guarantee, whether by reason of any legal limitation, disability or incapacity on the part of the Customer or any other fact or circumstance, and whether known to you or us or not, shall nevertheless be recoverable from us as sole or principal debtor in respect of it and shall be paid by us on demand.
>
> ...
>
> 21. For the consideration aforesaid and as a separate and independent stipulation in addition to and not in derogation of the guarantee herein given we hereby irrevocably and unconditionally undertake to indemnify you and keep you indemnified fully and completely against all claims and demands, actions and proceedings, losses, damages, costs and expenses including legal costs as between a solicitor and client and all other liabilities of whatsoever nature or description which may be made, taken, incurred or suffered by you in connection with or in any manner arising out of the Facilities.

[39] The principal debtor clause contained in cls. 9 and 17 and the indemnity given in cl. 21 without doubt created, as between the guarantors and the appellant, a contract of indemnity, which is a separate and independent contract, involving the undertaking on the part of the guarantors to pay any amount due under the loan, as well as interest thereon, regardless of the fate of the appellant's claim against the borrower, or its claim on the assets of the borrower in winding up.

[40] The difference between a contract of guarantee and a contract of indemnity has been explained in several cases previously decided. Among them are *Sia Siew Hong & Ors v. Lim Gim Chian & Anor* [1996] 3 CLJ 26 (Court of Appeal); *Ling Sing Hung & Ors v. Kontiki Trading Pte Ltd* [1998] 4 CLJ 345 (Court of Appeal); *Pau Ngie Siong & Anor v. Kontiki Trading Pte Ltd* [2000] 3 CLJ 560 (Federal Court) and *South East Asia Insurance Bhd v. Nasir Ibrahim* [1992] 4 CLJ 1801 (Supreme Court).

[41] Simply put, a contract of indemnity as defined by s. 77 of the Contracts Act 1950 is a contract entered into by two parties, namely, the promisor and the promisee, by which the promisor promises to save the promisee from loss caused to the promisee by the conduct of the promisor himself or by the conduct of any other person. A contract of guarantee, on the other hand is as defined by s. 79 of the Contracts Act 1950. It is a contract which involves three parties, namely the principal debtor, the surety and the creditor. The surety gives a guarantee that he (the surety) will perform the principal debtor's promise, or will discharge the principal debtor's liability, to the creditor if the principal debtor fails to do so.

[42] Under s. 81 of the Contracts Act 1950, the liability of a surety is co-extensive with that of the principal debtor, unless otherwise provided by the contract.

[43] It is very clear by the terms of the letter of guarantee and indemnity executed by the respondent that the contract entered into between the appellant and the respondent (and Mok Hwee Huan) is a separate and independent contract and that contract is a contract of indemnity. As such, s. 81 of the Contracts Act 1950 does not apply to enable the respondent to take advantage of the provisions of subs. 8(2A) of the Bankruptcy Act 1967 to limit his liability in the same manner as the borrower would be able to, namely to limit his liability to pay interest on the outstanding amount of the term loan to the date the Borrower was wound up, and not beyond that.

Conclusion

[44] Having considered the rationale for the introduction of subs. (2A) into s. 8 of the Bankruptcy Act 1967 as stated by the Honourable Minister in moving the amendment, and having considered the whole of s. 8 itself, as well as the other provisions of the Bankruptcy Act 1967 and the provisions of the Companies Act 1965, in relation to the debts of a bankrupt and a wound up company, as discussed above, our interpretation of subs. 8(2A) of the Bankruptcy Act 1967 is that it merely limits the secured creditor's right to continue to impose interest on the amount outstanding to him *vis-à-vis* the bankrupt or wound up debtor and the property of that debtor.

[45] To extend the operation of subs. 8(2A) beyond that is to do the very thing that the respondent urged us not to do based upon decided cases, such as *Home Luck Investments Sdn Bhd v. Commissioner of Federal Capital of Kuala Lumpur* [1969] 1 LNS 56, *Magor and St Mellons Rural District Council v. Newport Corporation* [1952] AC 189 and *Government of Malaysia v. Mohamed Amin Hassan* [1985] 1 LNS 79.

[46] In our view, it was not the intention of Parliament in enacting subs. 8(2A) of the Bankruptcy Act 1967 to affect the interest of the secured creditor *vis-à-vis* any guarantor or indemnifier. As such, the issue of contracting out of the statutory prohibition of subs. 8(2A) by the terms of the letter of guarantee and indemnity, and the issue of illegality of those terms, as concluded by the learned High Court judge, do not arise.

[47] We were therefore unanimous in allowing the appeal with fixed costs of RM5,000.